

31 Ricketson S, "Character Merchandising in Australia: Its Benefits and Burdens", (1990), 1, *Intellectual Property Journal*, 191 at 192; Coronis S.G., "Basking in Reflected Glories: Recent Character Merchandising Cases", (1990), 18, ABLR 5.

32 (1960) SR (NSW) 576 [Hereafter "Henderson"].

33 *Henderson*, note 32, per Evatt CJ and Myers J at 595.

34 *Talmax v Telstra Corp* (1996) 36 IPR 46 [Hereafter "Talmax"]. For a good discussion of this case see McMullan, note 7.

35 *Talmax*, note 34, at 53.

36 *Koala Designs*, note 29, at 325.

37 *Tot Toys v Mitchell v/a Stanton Manufacturing HC (NZ)* (1992) 25 IPR 337 at 379.

38 See, for a contrary view, Katekar B.F., "Coping with Character Merchandising: Passing Off Unsurpassed", (1996), 7, *Australian Intellectual Property Journal*, 178.

39 *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No2)* (1984) 156 CLR 414 [Hereafter "Moorgate"]; *Campomar Sociedad Limitada v Nike International Ltd* (2000) 169 ALR 677

[Hereafter "Nike International"].

40 *Nike International*, note 39, at 680.

41 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*. (1937) 58 CLR 479 at 509.

42 Consider the rejection of the same field of activity test in passing off in *Henderson*, note 34.

43 It is actually part of the common law of a number of Provinces, the most readily identifiable being Ontario. See generally C Nest "From Abba to Gould: A Closer Look at the Development of Personality rights in Canada" (1999) 5 *Appeal* 12.

44 *Athans v Canadian Adventure Camps Ltd* (1977) 17 OR (2d) 425, 80 DLR (3d) 583 [Hereafter "Athans"].

45 *Athans*, note 44, at 433.

46 *Athans*, note 44, at 434.

47 *Moorgate*, note 39, at 445.

48 Pendleton M.D., "Character Merchandising and the Proper Scope of Intellectual Property", (1990), *Intellectual Property Journal*, 242 at 249; Fisher, note 12, at 97.

49 *Zacchini v Scripps-Howard Broadcasting Co* 433 US 562 (1977); see also S Ricketson

"Reaping Without Sowing": Unfair Competition and Intellectual Property Rights in Anglo-Australian Law" (1984) 7 *University of NSW Law Journal* 1 at 3.

50 Consider the limits on the American right referred to above, or the Canadian application of a balancing of interests test: *Gould Estate v. Stoddart Publishing* [1998], 321 DLR (4th) 161 (Ontario Court of Appeal).

51 *Moorgate*, note 39, at 446.

52 For example the *Lanham Act* s 43(a) prohibits false or misleading statements in relation to sponsorship of goods and services.

53 Madow M, "Private Ownership of Public Image: Popular Culture and Publicity Rights", (1993), 81 *California Law Review*, 125; Sen S, "Fluency of the Flesh: Perils of an Expanding Right of Publicity", (1995), 59, *Alberta Law Review*, 739.

54 Madow, note 53, at 238-9.

55 Madow, note 53, at 144-6.

56 McCarthy, note 6, at 27.

Scott Rulston is a final year law student at the Australian National University.

Cultural Parochialism and Free Trade

Tim Magarey, another highly commended entry in this year's CAMLA Essay Competition, argues that the output of the 'cultural industries' should not be exempt from the ambit of free trade agreements.

Australia maintains a policy of protection for local film, television and other media producers through the mechanism of such legislative regimes as the *Broadcasting Services Act* 1992 (Cth) (BSA). Australian content restrictions on programming and foreign ownership rules operate to shield domestic producers from the ravages of the international marketplace. Many commentators argue that it is only because of the existence of this protection that local industries are able to survive. Legislative measures of the kind embodied in the BSA, however, are inconsistent with the provisions of international free trade instruments such as the *General Agreement on Tariffs and Trade* (GATT). It is only by virtue of exceptions such as that contained in Article IV of the GATT¹ that these regimes, which are by no means unique to Australia, persist free from international legal and political repercussions.

This paper considers the exclusion of culture from free trade instruments such as the GATT and from the auspices of the World Trade Organisation (WTO). It is argued that, given the benefits of free trade and the objectives of such agreements, there is no sufficient reason why goods and services which are

produced by the "cultural industries" should be exempt from the ambit of free trade agreements.

FREE TRADE AND THE GATT

The GATT has its origins in the negotiations at Bretton Woods following the end of the Second World War. It was one of a series of instruments and organisations which were established by the Allied Powers after that conflict with the principal objective of avoiding another war.² The premises on which the provisions of the GATT are based are:

- International trade raises the level of material wealth and thus the standard of living of individuals in participating nations. The theory of comparative advantage suggests that all trading nations benefit irrespective of their relative starting wealth.
- Free trade obligations prevent nations from deploying self-interested, beggar-thy-neighbour economic policies which in the inter-war period contributed significantly to the instability and conflict in the international system.
- Multilateral consensus is important because it prevents individual nations destabilising the system from without.³

Prima facie these premises are broad enough to have been generally accepted as sufficient justification for the jurisdiction of free trade agreements embodied in the GATT and the WTO. The detail of the provisions of the instruments themselves, however, has been the subject of hot debate since the GATT first came into force. The exclusion of particular industries from the province of the GATT has been expressed in the terms of their being "exceptions" to principles of general prevalence. The exception in Article IV,⁴ for example, was incorporated into the GATT in 1947 and has remained since then despite the efforts of the United States to have it removed or altered.⁵ Today, as was the case then, such exceptions have to be justified as a countervailing good which outweighs the benefits of trade.

INFORMATION FLOWS

In addition to general premises about the benefits of free trade, however, it is arguable that particular benefits attach to the free flow of information. While some of these are avowedly economic in flavour, others subsist in ideas about human rights which hold that access to information is essential to political and

economic freedom and personal development.⁶ If we regard the benefits of free access to information as real, then we must not allow barriers to information flows to be erected unless some compelling reason exists why we should.

Some of the arguments for exceptions to the general principles laid out above will be considered. It is argued that they are not convincing enough to warrant the significant exception to which they lay claim. In fact, such exceptions operate specifically in opposition to these principles and should be resisted.

ARGUMENTS FROM ECONOMIC MODELS

Many of the arguments against free trade in cultural products draw on economic models which suggest that these products are consumed in a manner which makes the application of the premises of GATT inappropriate. Foremost among these are arguments based on the public good aspects of cultural products.

Most cultural products possess the characteristics of public goods – that is they exhibit the conditions of non-excludability and non-rivalness.⁷ By non-excludability it is meant that it is impossible to prevent the consumption of a good. By non-rivalness it is meant that once the good is produced, consumption of it does not “use up” the good so that it cannot be consumed by another person. A pure public good is both non-excludable and non-rival. While both characteristics rarely subsist perfectly in any given cultural product, these products are distinguishable on these bases from private goods such as food.⁸ Movies and books, for example, exhibit the characteristic of non-rivalness. Having been consumed by one person they are available at a low marginal cost of supply for consumption by others. Free-to-air television and radio broadcasts are both non-rivalrous and non-excludable – anyone in the broadcast area can receive and consume for no cost the signal at no loss to any other person.⁹

The conditions for efficient allocation of public and private goods differ considerably. This is because the low marginal cost of supply of public goods means that once the sunk cost of producing the good is recouped it is inefficient to exclude any consumer who places positive value on the good and is



willing to pay a price higher than the (probably nominal) marginal cost of supply.¹⁰ Thus, if one consumer values the good at \$15, and another at \$5, it is inefficient to refuse to supply the second consumer on the grounds they are not willing to pay the same price as the first because there is no lower cost-based limit on the price which should be charged. The most efficient outcome, then, is to have every consumer pay a different price depending upon the peculiar value they place on the good. There are considerable transaction costs, however, associated with applying this in practice.¹¹ Because the cost of negotiating with each individual consumer is prohibitive, producers of public goods tend to fix prices at a given level and charge all comers that single price. This solution will always be less than optimal because there will be some consumers who place positive value on the good but do not purchase it because that value is less than the asking price.¹² At the same time, free-riders, who value the good above the asking price, will exploit the circumstances to make a windfall welfare profit. The chances of setting the price at a median level such that the revenue

returned on the good is equal to the net welfare achieved in the community are slim, and the spectacular profits and equally spectacular losses made on individual films and television programs, for example, testify to the difficulties the market has in setting the price appropriately. For this reason, opponents of free trade argue, the market is not an appropriate place for the production and consumption of public goods. The market is incapable of producing an efficient price and thus a net allocative inefficiency is bound to result.¹³

This is really an argument about unregulated markets rather than about free trade between nations. Its logical conclusion with respect to international trade, however, is that the size of the global marketplace exacerbates the scale of the inefficiencies which arise out the production of public goods capable of being consumed by an international audience. Moreover, trade between nations confers advantages on producers in nations with large native audiences which allow the recouping of sunk costs at home and the “dumping” of product at low prices for windfall profit abroad.

Regulation by nations, they argue, would eliminate the difficulties of pricing in the market, operate to divide up the international market to prevent inefficiencies spreading beyond the market immediately affected, and prevent dumping by applying tariffs and setting quotas on imports.

It is by no means clear that this is the case. It is difficult to see how governments are capable of pricing public goods more efficiently than markets. Governments possess no ready mechanism for determining the price which should be charged for access to such goods.¹⁴ Permitting individual national governments control over the trade flows and pricing of imported product would simply introduce variety into the field of choices of inefficient outcomes in the trade in cultural products.

Furthermore, "dumping," as the practice of price discrimination is often pejoratively referred to, is not necessarily inconsistent with efficient outcomes.¹⁵ This is especially true in the case of public goods. As was outlined above, inefficiencies arise in markets for public goods because the need to charge uniform prices prevents price fluctuating to match the peculiar value each individual consumer places on the good. Charging different prices for, for example, television rights or cinema rentals and admissions in different territories permits the matching of different median prices to different social and economic circumstances. In this way, a crude form of price discrimination, founded in the practice of licensing intellectual property rights on the basis of territorial distribution exclusivity, permits the recouping of a return which in sum is more likely roughly to approximate the net welfare value placed on the consumption of the good by individuals in any given territory.¹⁶

CULTURAL SOVEREIGNTY

Economic considerations, however, only account for some of the resistance to the inclusion of cultural products within the ambit of free trade instruments. Perhaps of greater concern to the proponents of cultural protectionism than doubts as to whether the market is capable of allocating resources for the production of cultural products are questions about whether the market, even an efficient

market, should be permitted exclusive dominion over the field of culture at all.

Central to this position seems to be a great resistance to commercialisation. Many advocates of protection reject the idea that culture is capable of being priced and bought and sold in the market. It has inherent value. Culture, they argue, is something more fundamental to society than the instrument of economic theory and the mechanism of the marketplace. To subject it to the vulgarities of a commercial environment is to rob it of that which makes it valuable.¹⁷

A corollary of this argument, often levelled at the Americans, is that culture is part of the social foundation on which the institution of the market is built, and that the degree of importance ascribed to the market in different societies is a function of the very culture which it is proposed should be subject to market forces. In the United States, a nation of entrepreneurs and businesspeople, the market is part of the spirit of the society. It is deeply intertwined with other values Americans hold dear. In some parts of Europe, by contrast, this is not the case. The role of the marketplace can be separated from other aspects of community life in a way which might not occur in the U.S. The point is that it is culture which determines the function of the market, not the other way around. Free Traders confuse this relationship when they advocate the abolition of trade restrictions on cultural products.

Another theme is that of "cultural sovereignty." Culture and the freedom of self-determination are linked in this idea. It is argued that culture is the stuff of which communities and individuals are made. It is the meta-narrative which we employ to understand the world and which permits us to generate choices about the way we choose to live our lives.¹⁸ It is thus vital to individuals' freedom that their heritage is not eroded by the imposition of alien cultures. Nations have an obligation to their citizenry to protect the national culture from the threat posed by the allure of exotic cultural imports.

There are fundamental difficulties with each of these arguments. First, and most obviously, they all assume that culture is something which is capable of being defined to a satisfactory degree to permit it to be the subject of specific protection.

It is not at all clear that the things which we collectively refer to as "culture" are susceptible of definition for such purposes. In the absence of accurate identification of those things which require protection, the measures which may be taken will necessarily be somewhat arbitrary in their focus and scope.

Secondly, even if culture is capable of being adequately delineated for the purposes of targeted protection, it may not be the case that cultural unity is congruent with nations or jurisdictions. Australia's cultural mix is testimony to this fact. Where national or jurisdictional boundaries take in a number of cultures, the same problems which arise at the international level may manifest in microcosm within those boundaries. Trade barriers are no answer to this problem.

Thirdly, trade barriers to protect culture as manifest in movies, television or books may be the top of a slippery slope. Extension of the logic of cultural protectionism into other industries could undermine the gains of fifty years of trade negotiations. While absolutism is naturally to be avoided, arguments for the maintenance of trade barriers lose a great deal of their cogency when viewed in light of claims by French and Swiss farmers for subsidy protection to support their role as bastions of European culture.

Fourthly, there is the difficult question of money. Who is to pay for the subsidies granted to and the high prices charged by coddled domestic producers? The answer, of course, is that it is the taxpayer and the consumer who pay for inefficiencies which the motivating force of competition could alleviate. We must question whether the price to be paid represents value for money when the outcome is arbitrary and uncertain.

Yet, more important, perhaps, than all of these objections, is one which is not restricted to economic or financial concerns. The GATT was originally conceived as a stabilising influence in a world where economic tensions have the potential to develop into war.¹⁹ The potential for the collision of cultures has never been thrown into starker relief than in the period since September 11th. It is arguable that the combination of cultural differences and third world poverty contributed to this dangerous situation.

While it is not suggested that free trade is the answer to all the world's ills, nor that broadcasting *Neighbours* or *Seventh Heaven* into every home on the planet would prevent hostility rooted in cultural misunderstanding from erupting into conflict, defiant economic and cultural isolationism is surely the wrong posture to be taking at this time. Such an approach is contrary to the spirit of the GATT, and is counterproductive in a world which now, more than ever, needs all the unity it can get.

CONCLUSION

All this is not to be taken as suggesting that the objectives of cultural protectionism are not noble and admirable in and of themselves. What is suggested is that in view of uncertainty as to the benefits flowing from protectionist measures, and the present pressing need for the global stability which instruments such as the GATT were specifically designed to foster, the costs of putting such measures into practice far outweigh the benefits derived from them. In the current environment, an exception to the principles on which the GATT is based cannot be countenanced.

1 For "Cinematographic Films"

2 Jackson J., *The World Trading System*, 2nd ed., 1997, Cambridge, MIT Press, p.13.

3 *Ibid* pp.11-20.

4 See note 1, *infra*.

5 "US Urges Free Worldwide Trade in Movies, Radio Programs During Uruguay Round Talks", 7 *International Trade Report* (BNA) No. 36 at 1369 and more recently, "Communication from the United States: Audiovisual and Related Services", WTO S/CSS/W/21, 18 December 2000 available at www.wto.org.

6 These ideas have been taken so seriously that they have been enshrined in a series of international treaties. The principal instruments are the Universal Declaration of Human Rights, art. 19, GA Res 217A UN Doc. A/810 (1948) and the International Covenant on Civil and Political Rights, art. 19, GA Res 2200, UN GAOR, 21st Sess., Supp. No. 16 at 55, UN Doc A/6316 (1966)

7 Brown C.V. & Jackson P.M., *Public Sector Economics*, Cambridge, MIT Press, 1991, p.28.

8 The classic example of a private good is a hamburger. It is excludable, because only one person can consume it at a time, and rivalry subsists over it because once it is consumed it cannot be consumed again.

9 Owen B.M. et. al., *Television Economics*, Lexington, Lexington Books, 1974 p.57.

10 Picard R., *Media Economics*, London, Sage, 1989, p.52.

11 Transaction costs may be defined as anything which reduces the incentive to trade with another rather than produce oneself; hence, "transaction costs comprise all those costs that cannot be conceived to exist in a Robinson Crusoe (one-man) economy." Cheung, "On The New Institutional Economics," in Lars Wierin and Hans Wijkander (eds), *Contract Economics*, Oxford, Blackwell, 1992 at 366.

12 Owen, p.20.

13 C.E. Baker, An Economic Critique of Free Trade in Media Products, (2000) 78 *North Carolina Law Review* 1357 at 1384

14 Ming Shao W., "Is There No Business Like Show Business? Free Trade and Cultural

Protectionism," 20 *Yale Journal of International Law* 105 at 137-138.

15 In fact, dumping is a particular form of anticompetitive price discrimination where product is sold at a loss (at a price below the marginal cost of supply) on overseas markets with the purpose of driving out competition. Not all price discrimination amounts to dumping, and the test for determining whether dumping has occurred is complex and is beyond the scope of this discussion.

16 It is to be noted, of course, that the practice of price discrimination is the subject of some controversy amongst proponents of free trade in cultural products. It is arguable that it is not consistent with economic models of workable competition. This controversy is part of a wider debate about the competition issues which arise with respect to territorial exclusivity in intellectual property licensing, which is, again, outside the scope of this paper. Mention should be made, however, of the fact that an international effort to encourage the abolition of territorial exclusivity practices and the permitting of "parallel importation" is being undertaken in the name of freer trade. The recent amendment of the Copyright Act to permit the parallel importation of audio compact discs is an example of this.

17 Witness the comment by former French Prime Minister Edouard Balladur during the Uruguay Round of GATT negotiations in 1993: "[The French] cannot accept everything related to the fundamental values of our tradition, our culture, our civilisation being treated like ordinary traded goods." Qtd in K. Auletta, "Television's New Gold Rush," *New Yorker*, Dec. 13, 1993, p.88.

18 Kymlicka W., *Multicultural Citizenship*, Oxford, Clarendon Press, 1995, pp. 84-5.

19 Jackson, p.17; see note 2 *infra*.

Tim Magarey is an Honours student in the schools of International Relations and Screen Studies at Flinders University.

Internet Dumping and Regulation of the Audiotex Industry

John Corker examines the risks associated with using 190 and 0011 services and some possible solutions.

Internet Dumping occurs when a user's modem is disconnected from their usual dial-up number and reconnected to an international (0011) or premium rate phone number, such as 190 numbers (without their knowledge). Most commonly it occurs on adult sites. In many cases people are not aware that they have been dumped until they receive an unusually high phone bill.² Some consumers have reported having received "international phone bills for thousands of dollars"³.

Internet Dumping has occurred in Australia at least since mid 2000⁴. As at June 2000 about 2 users a week registered

complaints with the Telecommunications Industry Ombudsman (TIO). However the average number of complaints for the 9 months to end of September 2001 is about 80 complaints a month. The total of Internet Dumping complaints received by the TIO to end September 2001 is close to 1000.⁵ Complaints to Telstra are understood to be higher than this.

THE AUDIOTEXT INDUSTRY

The Audiotex or Telemedia industry provides access to a range of recorded information and interactive services (speech, facsimile or data) via premium or international telephone lines. In

Australia premium rate services were initially provided by Telstra in the mid '90s using the 0055 prefix. This prefix was phased out in August 1998 and replaced by the 190 prefix. Cable and Wireless Optus also provided Telephone Information Services at premium rates from 1995-2000 but no longer offers the service.

In the US use of 0011 numbers for access to adult services first appeared in the late 1980's and operated without any form of regulation⁶. It has grown as an industry and now provides access to a range of recorded information and interactive services (speech, facsimile or data). The